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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KENDRA K., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and JOHNNY K., Appellees.	2 CA-JV 2009-0116 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD-200700014

Honorable Stephen M. Desens, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Kendra K. challenges the juvenile court's October 13, 2009, order entered after a contested severance hearing, terminating her parental rights to Johnny K., born in October 2005, on grounds of length of time in care under A.R.S. § 8-533(B)(8)(c) and mental illness and chronic substance abuse under § 8-533(B)(3).[1] Kendra contends the termination order should be reversed because she was not provided with appropriate reunification and rehabilitation services. She also asserts her trial counsel was ineffective for failing to object to Johnny's placement with relatives in Washington, who live three hours from her, and to advise her of her rights under the Interstate Compact on the Placement of Children (ICPC). *See* A.R.S. §§ 8-548 through 8-548.06. For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent's rights if it finds by clear and convincing evidence that any statutory ground for severance exists and if it finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). "The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.2d 203, 205 (App. 2002). Thus, on review, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Id.*

[1]Johnny's alleged fathers, whose rights were terminated based on abandonment under A.R.S. § 8-533(B)(1), are not parties to this appeal.

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Kendra gave birth to Johnny in Arizona while she was fleeing from a Washington arrest warrant. She was selling illegal drugs to support herself at the time. Arizona Department of Economic Security (ADES) monitored Johnny's well-being because it had received reports that Kendra had been arrested during a drug raid in Washington while she was pregnant with him; her parental rights to another child, born in 2002, were terminated in Washington; and she recently had been using and selling methamphetamine in Johnny's presence. In February 2007, when Johnny was sixteen months old, ADES filed an emergency motion to "pick up" Johnny because they could not locate him. Authorities located Johnny in June 2007, at the same time Kendra was arrested on outstanding Arizona and Washington warrants.

¶4 ADES filed a dependency petition alleging that Kendra was unable to parent Johnny because of her arrest and history of substance abuse. In September 2007, the juvenile court adjudicated Johnny dependent after Kendra admitted she was unwilling or unable to parent Johnny because of her incarceration and her anticipated extradition to Washington. The original case plan goal was family reunification. In June 2007, Child Protective Services (CPS) facilitated a psychological evaluation by Dr. Philip Balch that was conducted during Kendra's brief stay in an Arizona jail before she was extradited to Washington. Kendra failed to cooperate with the evaluation because she was going through a detoxification process at the time. Nonetheless, Dr. Balch concluded Kendra "did not present as a person who could be counted on to be a protective and adequate parent." In October 2007, Kendra began serving a thirteen-month prison term in

Washington. While in prison, she did not send Johnny letters or pictures and essentially failed to establish "a bond [or] a relationship with him," despite CPS's urging that she maintain contact with him. During her incarceration, CPS case managers maintained at least monthly contact with Washington authorities "to inquire about [Kendra's] progress in services and ensure they were able to offer her the services that would help her once she was no longer incarcerated." In prison, Kendra received substance abuse treatment, parenting skills classes and other services to help her transition from incarceration.

¶5 Upon her release in May 2008, Kendra indicated to CPS that she intended to stay in Washington. Following a Family Group Decision Making meeting that same month that Kendra was unable to attend, it was decided that Johnny would be transferred in December 2008 from his Arizona foster-care placement to live with Kendra's aunt and uncle in Washington (the G.s). This decision was made, in part, to facilitate visitation between Kendra and Johnny.

¶6 The original case-plan goal of family reunification was changed to severance and adoption in June 2009. At the court's direction, ADES filed a motion to terminate Kendra's parental rights shortly thereafter,[2] alleging that Johnny had been in a court-ordered, out-of-home placement for fifteen months or longer, that Kendra was unable to parent him because of mental illness or a history of chronic substance abuse, and that termination was in Johnny's best interests. A contested termination hearing was held in September 2009, and the court terminated Kendra's parental rights the following month.

[2]This was ADES's second motion to terminate.

¶7 On appeal, Kendra claims ADES did not make diligent efforts to provide reunification services sufficient to allow severance based on out-of-home placement for the following reasons: the G.s lived three hours away from Kendra and ADES had not provided transportation assistance to facilitate visits; ADES had not provided an aide to document Kendra's visits with Johnny; and ADES had failed to facilitate Kendra's participation in hands-on parenting classes after she was released from prison. To justify termination under § 8-533(B)(8)(c), ADES must prove the parent has been unable to remedy the circumstances that caused the child to remain in an out-of-home placement for fifteen months or longer and there is a substantial likelihood the parent will be unable to parent the child in the near future. Although ADES must give a parent the time and opportunity to participate in programs designed to improve the parent's ability to care for his or her child, *see Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999), it is not required to provide every conceivable service or ensure that a parent participates in each service offered. *See In re Maricopa County Juv. Action. No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). Nor is ADES required to provide services that would be futile. *See Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053.

¶8 Kendra, who does not have a driver's license, asserts that it was difficult for her to visit Johnny because ADES had placed him with relatives who lived three hours away from her. She testified that family and friends took her to visit Johnny once a month from January to September 2009. However, at the permanency planning hearing in May 2008, Kendra's attorney acknowledged that Kendra had been in favor of placing Johnny with the G.s so she could visit him. Furthermore, Kendra herself told the court

that, although she ultimately hoped to reunify with Johnny, "I understand that they're transferring [Johnny] to my aunt's and everything. That's good with me . . . I can go to my aunt's and visit him." In light of this evidence, we reject Kendra's additional unsupported argument that ADES "improperly insisted that a familial placement be named for Johnny in Washington."

¶9 In addition, Kendra testified she had considered accepting a job in Montana after she was released from prison, but instead returned to Washington and accepted a job at a Wendy's restaurant. In fact, as reported in the July 2009 ICPC quarterly supervision report, Kendra had told the G.s in May 2009 that she would not be able to see Johnny for three months because of the job in Montana. Kendra cannot convincingly argue ADES should have placed Johnny's needs for a stable home on hold pending her employment decision, particularly in light of her having told the court she approved placing Johnny with the G.s. In addition, the ICPC report documents that CPS could not use Washington transportation providers to facilitate visits with Johnny because the providers would not accept out-of-state payment. It also notes that Kendra did not call Johnny as often as permitted, nor did she call him when she had specifically promised to do so. Based on this record, we simply cannot say the decision to move Johnny from a foster home in Arizona to the G.s' home in Washington, the same state where Kendra resides, or its failure to provide transportation services in light of the circumstances, constituted a failure to diligently provide rehabilitative services or hindered her ability to comply with her case plan.

¶10 Kendra next asserts ADES's failure to provide an unbiased supervisor to document her visits with Johnny at the G.s' home also constituted a failure to diligently

provide reunification services. Although a parent aide supervised Kendra's visits in Arizona, visitation aides in Washington were unable to accept payments from Arizona, so Kendra's aunt, with whom Johnny was placed, supervised the visits in Washington. Kendra's attorney questioned her about this very issue at the severance hearing. Noticeably missing from Kendra's testimony is any suggestion of a problem related to her aunt's supervision of her visits with Johnny. Moreover, her testimony squarely placed the supervision issue before the juvenile court for its consideration. Therefore, even assuming, as Kendra vaguely suggests, that the aunt's reports of the visits may have been biased, taken in the context of the other evidence presented at the severance hearing, we can infer that the court considered this issue but did not consider it a failure on ADES's part to provide reasonable reunification services. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.2d at 205 (juvenile court in best position to weigh evidence).

¶11 Kendra next contends ADES should have provided hands-on parenting classes in addition to those she had received in prison. Kendra accurately points out that, although Dr. Balch had recommended in his second evaluation that she take parenting classes, ADES did not urge her to do so. Upon her release from prison, CPS wanted Kendra to participate in a variety of services, including an additional psychological evaluation, individual counseling, random drug testing, visitation with Johnny; to obtain a stable home; to keep a self-sufficient job; and to follow a psychiatrist's medication regime to address her mental health problems. However, Kendra did not participate in individual counseling from the time of her release in May 2008 until January 2009. Even then, once she had completed the necessary intake procedure to obtain services her attendance at counseling in the nine months before the severance hearing was infrequent,

at best. Although Kendra explained that transportation and financial issues made it difficult for her to regularly attend counseling, she also reportedly told one of her social workers in January 2009 that she did not know why she had to go to counseling. In addition, Kendra did not successfully complete the Home Base Program, which was provided to help her establish stable housing and employment, nor did she maintain a relationship with her "Christian mentor," who reported she had hoped to help Kendra with her parenting skills.

¶12 The CPS case manager, Monica McDonough, testified that even though Kendra cares for Johnny, she does not know him or interact with him as a mother should, and that she "does not want to cooperate with services [CPS] ask[s] her to do." She did not anticipate Kendra would be able to adequately parent Johnny any time in the near future. She responded affirmatively when asked if Kendra had demonstrated a pattern of not regularly attending counseling, seeing a psychiatrist, or taking medication to treat her depression. She also stated that she was unaware of any additional services ADES could offer to Kendra that would enable her to parent Johnny in the foreseeable future. Based on the overwhelming evidence before the juvenile court supporting severance based on out-of-home placement, including all of the services ADES did, in fact, provide, we do not find its failure to have urged Kendra to participate in additional parenting classes to be sufficient grounds for reversal.

¶13 Throughout the dependency, the court repeatedly found ADES had made reasonable efforts toward reunification, a finding Kendra apparently did not challenge. In its findings of fact and conclusions of law, the court specifically found that ADES had made diligent efforts to provide reunification services, as § 8-533(B)(8)(c) and (D)

require. Because sufficient evidence supports the juvenile court's determination under § 8-533(B)(8)(c), we need not address Kendra's arguments regarding the other statutory ground for severance. *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205. Similarly, because Kendra has not challenged the court's finding that ADES had proven by a preponderance of the evidence that termination was in Johnny's best interests, we likewise do not address that finding.

¶14 Finally, Kendra claims trial counsel was ineffective for failing to object to Johnny's placement with the G.s and for being unaware of and therefore not advising her that the ICPC would have permitted Johnny's placement with non relatives; she also asserts "perhaps a closer placement could have been found." We address Kendra's ineffective assistance claim to the extent it relates to the severance ruling now before us on appeal.

¶15 Although it is unclear whether Arizona recognizes a separate claim for ineffective assistance of counsel in the appeal of a termination order, we have previously recognized a due process right to the effective assistance of counsel to ensure the fundamental fairness of the severance proceeding. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 14, 173 P.3d 1021, 1025 (App. 2007). As we did in *John M.*, we look for guidance to the two-part standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for demonstrating ineffective assistance by criminal defense counsel. *John M.*, 217 Ariz. 320, ¶¶ 14, 17-18, 173 P.3d at 1025-26. We assume, by analogy, that a parent claiming ineffective assistance in a severance proceeding must likewise establish both substandard performance by counsel and prejudice. *Id.* ¶ 17.

¶16 We are unaware of any evidence in this record, nor does Kendra direct us to any, to support her claim that counsel was ill-advised regarding the ICPC, or that counsel's advice was in any way deficient or caused her to suffer prejudice. To the contrary, the evidence suggests Kendra approved of placing Johnny with the G.s. Moreover, to the extent Kendra claims counsel's failure to object to the placement below has prejudiced her ability to now appeal the placement decision itself, we reject that argument. With the termination of her parental rights, Kendra lost standing to challenge the court's decision regarding Johnny's placement. *See Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, ¶ 2, 214 P.3d 1010, 1012 (App. 2009).

¶17 For all of the foregoing reasons, we affirm the juvenile court's order terminating Kendra's parental rights to Johnny.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

VIRGINIA C. KELLY, Judge